BRIEF IN SUPPORT OF PETITION.

JURISDICTION.

The final order of the Circuit Court of Appeals denying the petition of the petitioner for rehearing was entered October 1, 1940 (R. 95). The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925. (28 U. S. C. A. 347.)

STATEMENT OF THE CASE.

The facts, not in dispute, are set forth in detail in the amended petition filed with the Board (R. 42) and in the petition for review filed with the United States Circuit Court of Appeals for the Seventh Circuit (R. 59 to 66 inc.). However, for convenience, they may be briefly summarized as follows:

The petitioner was at all times, during the period in which the processing taxes in controversy were paid, engaged in the meat packing business. It is commonly known as a Pork Packer, as its business is principally confined to the purchase and slaughter of hogs and the sale of the resultant pork products. Except for killing floor facilities, its business with respect to cutting, curing, smoking, cooking, manufacturing sausage, and other processing, was virtually the same as its larger competitors, who operate their own abattoir.

Petitioner enaged C. A. Burnette Company, who had an abattoir, to slaughter its hogs for a fee of 75¢ per head. After the killing and chilling operations, conducted under the supervision of petitioner, the carcasses and viscera were transported to its own plant for a continuation of its processing. The act of killing and chilling required but a few hours, whereas the preparation for market (except for fresh pork products) required from thirty to ninety days.

The processing tax on a 220 lb. hog at $2.25 per cwt. live weight amounted to $4.95; on a 350 lb. hog the tax was $7.88. The tax was, therefore, from five to ten times greater than the 75¢ fee paid for killing.

Petitioner paid the processing taxes for November and December, 1934, amounting to $13,711.23, directly to the

Collector of Internal Revenue, Chicago, Illinois (R. 10). In May, 1934, the Respondent ruled that petitioner was not the taxpayer. (This ruling is alleged to be in conflict with the Agricultural Adjustment Act.) The amount collected was later conditionally returned and applied to the account of C. A. Burnette Company. Thereafter the Collector required the processing tax, amounting to $243,774.79, to be paid to C. A. Burnette Company, who in turn remitted these collections to the United States Government. The processing taxes were thus paid until May, 1935, when the Collector was enjoined from further collections (R. 19, 43). However, on July 1, 1935, processing taxes for the amount of $2,589.13 were paid directly to the Collector upon his demand (taxes accruing in May, 1935, prior to the effective date of the injunction entered by the United States District Court restraining further collection). No refund has been received by petitioner for any of the processing taxes illegally exacted from it (R. 43, 44).

C. A. Burnette Company sent invoices for the killing fee and separate notices of the tax imposed upon petitioner's hogs and considered itself the collection agent with respect to the tax. Its books were made available to petitioner in order that it could satisfy itself that the tax collections were being promptly remitted to the Collector.

C. A. Burnette Company filed a claim for refund for processing taxes paid through it by petitioner and others on P. T. Form 78. A schedule of the amounts received from its customers was included. Petitioner was informed and believes that the claim provided that any payment to petitioner on its claim was to operate as a satisfaction of C. A. Burnette Company's claim to the extent thereof (R. 46).

C. A. Burnette Company was financially unable to make an unconditional reimbursement of the tax collected from petitioner and others with respect to their hogs, as all the money collected had been remitted to the Collector.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred in holding that:

1. Petitioner was not the processor who was obliged to pay the processing tax under the Agricultural Adjustment Act.

2. The Board was without jurisdiction to entertain this proceeding in its entirety.

3. The Board was without jurisdiction to entertain this proceeding to the extent that petitioner paid processing taxes directly to the United States.

4. A third party, through whom petitioner was compelled to pay most of the processing tax, was the sole first domestic processor of all (or any of) petitioner's hogs, under the Agricultural Adjustment Act.

5. The public abattoir (who was an agent of your petitioner) slaughtered petitioner's hogs "for market" and was, therefore, the first domestic processor within the meaning of the Agricultural Adjustment Act.

6. Title VII of the Revenue Act of 1936 restricted refunds to the particular processor who alone was obligated to pay the processing tax.

7. The refund statute does not violate due process in denying petitioner a right of recovery.

8. The public abattoir was not the "agent" or "collection agent" with respect to the processing taxes paid by petitioner on its own hogs.

ARGUMENT.

I.

THE PETITIONER WAS THE TAXPAYER UPON WHOM THE PROCESSING TAX WAS IMPOSED WITHIN THE INTENDMENT OF THE AGRICULTURAL ADJUSTMENT ACT.

Under the provisions of the Agricultural Adjustment Act, processing taxes were imposed upon the processing of hogs from November 5, 1933 until the Act was invalidated on January 6, 1936. Petitioner paid the tax with respect to its hogs until in May, 1935, when the Collector of Internal Revenue, Chicago, Illinois, was enjoined from further collections. The fact that petitioner was compelled to pay most of the taxes in controversy to C. A. Burnette Company (R. 43), who in turn remitted the same to the Collector, did not settle the question as to who was the actual taxpayer *within the meaning of the Act.*

Petitioner was at first compelled to pay the processing taxes to the Collector, but early in 1934 was informed that payment was to be made to C. A. Burnette Company (R. 43). There was then no justification in opposing the Collector's demand. The amount of tax payable was the same regardless of whether paid direct to the Collector, or indirectly through C. A. Burnette Company, to the United States Government.

It is a different matter, however, when an alleged improper interpretation of the law is asserted for the purpose of creating an artificial classification between meat packing companies with the intention to give rights to some while withholding those rights from others (R. 9).

The respondent now takes the inequitable position that the public abattoir cannot recover as it obviously bore no

part of the burden of the illegally collected processing tax, and petitioner cannot recover (even if it be admitted that it bore the full burden thereof) because the petitioner did not pay the tax to the United States Government. Yet the *larger packing company competitors* of the petitioner shall have a right to recovery under Title VII of the Revenue Act of 1936, a remedial statute, which must be liberally and equitably construed.

Therefore, to the extent that the Agricultural Adjustment Act forms the basis of determining the rights of the petitioner under Title VII, the following analysis is made of the Agricultural Adjustment Act, amendments thereto, and the Regulations issued thereon.

The purpose of this analysis is to show:

1. That the rulings of the Respondent, issued pursuant to the Agricultural Adjustment Act are in conflict with the said Act.

2. That where the words "custom milling" and "ginning" (custom ginning) were included or excluded from the meaning of the word "processing," this was soundly in accord with the custom of those industries.

3. The processing tax was not imposed upon the first domestic processing of a commodity, but the "first domestic processing" within the meaning of the Act. The Act permitted some processing in advance of the "processing" upon which the tax was imposed.

4. Congress intended the tax to be imposed upon that processor whose "processing" operations when once begun are continued by that processor until he has transformed or prepared the commodities into that form where it is "first marketable" in accordance with the customs and usages within the particular industry.

5. That the definition of "processing" found in the Act is clearly stated by Congress and did not require the Respondent to speculate as to the meaning or intent thereof.

6. That the so-called "custom slaughterer," as such, could not "slaughter hogs for market," and with respect to petitioner's hogs, they were not processed by the slaughterer to a "marketable form."

Petitioner respectfully contends that the Commissioner has (unknowingly) exceeded his powers and usurped the function of Congress by creating a liability where none existed with respect to a "custom slaughterer," or a so-called "custom processor" with respect to hogs. The Act of Congress determines the person upon whom the tax was imposed, Regulations and departmental rulings to the contrary notwithstanding.

In the case of *Nordberg* v. *U. S.*, 51 Fed. (2d) 271, the court, on page 273, said:

> Laws which vest power in administrative officers to make regulations, import regulations to enforce the law as written, confer no authority to legislate, to amend and change the terms of the statute, to defeat the intent of Congress, to create liability where the statute does not. The statute and its judicial construction control, not the regulation.

It is noteworthy that nowhere in the Agricultural Adjustment Act, before or after the amendment, do we find reference to the words "custom slaughterer," or, for that matter, "custom processor," or, "custom processing tax." That Act provides in Sec. 9 that:

> The processing tax shall be levied, assessed and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor.

The Act defines the meaning to be given to "processing" as used above. The words "custom processing tax" first appear in Regulations 96, Article 101 (h) (Approved October 15, 1936) issued pursuant to Title VII of the Revenue Act of 1936.

The original Act (Public No. 10, approved May 12, 1933,

H. R. 3835) defines the word "processing" with respect to hogs as follows:

> Section 9 (d) (4). In the case of hogs, the term "processing" means the slaughter of hogs for market.

It will be observed that no comma or other punctuation mark is shown to separate in any way the words "slaughter of hogs for market." They must be taken together to confer the meaning intended. The intention was not "the slaughter of hogs," but "*the slaughter of hogs for market,*" as defining the word "processing" with respect to hogs. Further reference to the foregoing will subsequently appear herein.

Public Act No. 213, approved May 9, 1934, amended the Agricultural Adjustment Act and provided (Section 6) that the term "processing" includes manufacturing, when used in Part 2 of Title I of the Act.

By the above amendment Congress has recognized that the words "processing" and "manufacturing" are frequently substituted for each other without a shade of a change in the meaning thereof. (See *Merill* v. *Yeomans*, 94 U. S. 568, at 572.) One operation may be commonly referred to as "manufacturing" while another is known as "processing," largely depending upon the custom of the particular industry to which reference is made. Sausage is "manufactured," while hams are "processed." It is therefore submitted that by this amendment the well established definition of a "manufacturer" for excise tax purpose was to apply to both the words "processor" and "manufacturer" where used in the Agricultural Adjustment Act. That the intent was to carefully follow the customs of the industry, there can be no doubt.

The Agricultural Adjustment Act was again amended by Public No. 476, approved June 26, 1934, which provided as follows:

> Sec. 2 (a) Paragraph (4) of Subsection (d) of

Section 9 of the Agricultural Adjustment Act as amended is repealed.

(b) Paragraph (7) of Subsection (d) of such Section 9 is amended to read as follows:

9 (d) (7) In the case of any other commodity, the term "processing" means any manufacturing or other processing involving a change of the form of the commodity or its preparation for distribution or use, as defined by regulations of the Secretary of Agriculture; and in prescribing such regulations the Secretary shall give due weight to the customs of the industry.

(Note—Sec. 9 (d) (7) above became 9 (d) (8) by amendment of August 24, 1935, later referred to.)

It is to be noted that Hog Regulations, Series 1, (approved October 18, 1933) defines "first domestic processing" as "the slaughter of hogs for market," conforming exactly to the Agricultural Adjustment Act, and this definition is set forth verbatim in T. D. 4406 (approved November 11, 1933).

Hog Regulations, Series 1, Supplement 1 (approved October 29, 1934) is second and last reference to the definition of "first domestic processing" by the Secretary of Agriculture and reads as follows:

FIRST DOMESTIC PROCESSING — The term "first domestic processing" means the slaughter of hogs for market; except that (a) in the case of a producer or feeder who shall distribute the carcass or any edible hog product directly to a consumer, the term "first domestic processing" means the preparation of the carcass or any edible hog product for sale, transfer or exchange or for use by the consumer, and only the edible product or products so sold, transferred, exchanged or distributed by or for the producer or feeder shall be deemed to have been processed, and (b) *in the case of a producer or feeder who shall sell, transfer or exchange any carcass or edible hog product* (1) to any person engaged in reselling, rehandling, cutting, trimming, rendering, or otherwise preparing such products for market (including, but not limited to, retailers, wholesalers, distributors, butchers, packers, factors, or commission merchants), or (2) to any restaurant, hotel, club, hospital, institution, or establishment of

> similar kind or character, the term "first domestic processing" means the initial act of such person, restaurant, hotel, club, hospital, institution, or establishment which involves the preparation of the carcass or any edible hog product for further distribution or use. (Italics ours.)

T. D. 4518 (approved January 25, 1935) repeats the definition set forth above. It will be noted that the Secretary of Agriculture at no time refers to "custom processing" or a "custom processor" with respect to hogs.

The foregoing is believed to be a complete summary of the Act and amendments relating to the definition of "processing" with respect to hogs. No mention is made there of "custom slaughtering." Yet, we find clear reference to "custom processing" on other commodities.

Frequently, in interpreting a doubtful provision in a statute, the intendment of the legislature may become clear if we can find a *general plan* clearly expressed by taking the statute in its entirety. Petitioner contends that there was a general taxing plan presented in the Agricultural Adjustment Act, and that plan had been previously employed with respect to manufacturers' excise taxes. Petitioner further contends that all departures from this *general plan* were both clearly expressed and readily understandable.

To find the *pattern* or *general plan,* a brief reference will be made to each of the basic and competing commodities taxed under that statute.

Section 9 (d) (1) particularly defines the meaning of "processing" to include "custom milling" in the case of corn, wheat, and rice. Public No. 320, 74th Congress, approved August 24, 1935, *excluded rice* from the above and *added rye and barley.* That amendment also added Section 9 (d) (7) with respect to rice, but continued to include "custom milling" in the definition of "processing." That

which was Section 9 (d) (7) before the above amendment became Section 9 (d) (8).

Now let us consider the effect and underlying meaning of the particular inclusion of "custom milling" in Section 9 (d) (1). It is commonly known that the processing of wheat, barley, and rye by a "custom miller" is chiefly for flour jobbers, and others similarly circumstanced, who have no milling facilities. The grain is delivered to the custom miller who processes it into flour ready for immediate sale to the public. As a part of the process the flour is placed in barrels or sacks, which the custom miller will furnish if desired, or the container may be supplied by the owner of the grain. The sacks or barrels, if furnished by the owner, usually carry a trade-name under which the flour is sold. If the owner desires to blend the flour the custom miller will perform that service too as a part of the processing operation. In any event, the resultant product from the "custom milling" is ready to market. No further processing is required as all of the resultant product is ready for direct consumption and in that form regularly purchased by the consumer.

That is not all. The said Act particularly excluded "ginning" (including custom ginning) in defining the "processing" of cotton in Section 9 (d) (2). Clearly Congress was recognizing the difference between the customs of the respective industries in particularly setting forth *what was to be and what was not to be "processing" within the meaning of the Act.*

"Ginning" is defined under the Bankhead Cotton Act of 1934, Section 23 (d) as follows:

> The term "ginning" means the separation of lint cotton from seed cotton.

The Bankhead Cotton Act, Section 4(a), assessed a tax upon the ginning of cotton, under certain conditions, upon the ginner "whether as agent or owner or otherwise." There was here no uncertainty as to terms, for whether

"agent" or "owner" the tax was imposed upon the ginning. The ginning was *the first processing of cotton,* but not the "first domestic processing" *as defined by the Agricultural Adjustment Act.*

In the case of *Stahmann, et al.* v. *Vidal,* 305 U. S. 61, 59 S. Ct. 41 (which case arose under the Bankhead Cotton Act), this Court held that the "ginner" (custom ginner) was the "collecting agent" for the taxpayer with respect to the tax, and allowed a recovery to the owner of the cotton.

The lint cotton (after ginning) could be sold, and may at times be sold by the owner, *but this is not common practice* in the industry. From a practical point of view that processing which converted the cotton to "marketable form" and "for market" had not begun until after the ginning process was completed.

Referring now to Cotton Regulations, Series 2, Supplement 2 (approved November 29, 1933), issued by the Department of Agriculture, we find *the first domestic processing* of cotton defined as follows:

> First Domestic Processing.—(a) With respect to cotton that is to be spun, is every state of manufacture or processing up to the removal of the bobbin or crop from the spinning machine on which its yarn has been spun.
>
> (b) With respect to cotton that is not to be spun, is that amount and degree of manufacture or processing up to the point where the cotton is fashioned into an article, either to be packaged and sold as such, or to be used for further manufacturing into a different type of article.

From this definition, which is in compliance with the Agricultural Adjustment Act, *the purpose was to impose the tax on that processor who was engaged in that "processing" that prepared the cotton "for market" and "for market" in that form in which cotton is generally sold and generally recognized as having a "marketable form."*

Equally clear is the fact that the "processor", as defined by the act, *may be other than the one who performs the actual first domestic processing.*

Nor do we find a different taxing pattern with respect to sugar. Public Act No. 213—73rd Congress, Sec. 2 (a), provides that—

> The term "first domestic processing" means that processing which *directly results in direct-consumption sugar.* (Italics supplied.)

The general plan was continued in imposing the processing tax on tobacco. Tobacco Regulations, Series 1, issued by the Secretary of Agriculture, with the approval of the President, on September 14, 1933, presents the following definition of the words "first domestic processing" as applied to that commodity.

> *First Domestic Processing.*—The first domestic processing of cigar-leaf tobacco is the fabricating of the product *to be used by the consumer.* The acts of stemming, sweating or fermenting and conditioning shall not be deemed processing.
>
> (a) In the case of cigars, stogies, cheroots or small cigars, it is the fabricating of cigar-leaf tobacco into the form *to which no tobacco is added and from which no tobacco is subtracted;* all scrap, cutting and clippings not left in such products shall be deemed not to have been processed.
>
> (b) In the case of scrap chewing and/or smoking tobacco, it is the preparing of any form of cigar-leaf tobacco for consumption as scrap chewing and/or smoking tobacco. (Italics supplied.)

Reference may also be made to the definition of processing of jute bags or jute yarn (Jute Regulations, Series 1 of the Department of Agriculture), and to paper bags (Paper Regulations, Series 1 of that Department), or large cotton bags (Supplemental Certificate dated July 7, 1934), and we find that "processing" begins at various stages of secondary processing methods, depending upon the circumstances in each case. All lead to the same inevitable con-

clusion. *"Processing" as used in the Act means that operation, which, once begun, is continued by that processor until he has transformed the commodity into that "form" where it is "first marketable" in the ordinary course of business, i. e., ready for marketing.*

As the Agricultural Adjustment Act and the Regulations issued pursuant thereto, are certain with respect to all commodities (excepting hogs), the purpose and intent of Congress, if there discovered, can be equally clear and certain. The only "custom processing" intended to be considered as *the first domestic processing* under the Act applied to grain. There is no secondary stage to processing as to those items, and Congress was compelled to impose such *processing tax* against the *only processor.*

The terms *custom milling* and *custom ginning* have been regularly used in those industries for many years. Petitioner contends that the use of the words *custom slaughtering* was not common. A person who slaughters animals for owners has long been known and referred to as a *public abattoir.* Congress has at no time used the words "custom slaughterer." The *full credit* for the acceptance and use of those words belongs to the Respondent.

It is respectfully suggested that the following, and quite obvious, errors of the Respondent were the beginning of the present chain of circumstances that has placed petitioner in its present inequitable position.

Regulations 81 of the Treasury Department, relating to processing tax under the Act, provides on the introductory page under (1) that the processing tax is to be imposed upon the first domestic processing. Nothing is there stated that qualifies those words to mean the *first domestic processing as defined by the Act.*

Article 4 of Chapter 3 of Regulations 81 provides that the processing tax is upon the first domestic processing of any commodity with respect to which the tax is in

effect. Nor is the reader again apprized of qualifications. In Article 8 of the same chapter the Regulations state that the liability for the tax attaches to the processor upon the first domestic processing of the commodity and the payment of the tax must be made by him at the prescribed time. Again we have no reference to the limitations prescribed by the Act itself. And yet, we find under Article 2 (h), Chapter 2, of Regulations 81, the following wording, "processing has various meanings depending upon the commodity in question" and then enumerates with respect to the various commodities the definitions substantially as found in the Act. These inconsistencies or omissions may have been largely responsible for the erroneous ruling that has led to the present inequitable and unjust situation.

Now, what happened to cause the present difficulty? It will be recalled that at first petitioner, and some others similarly circumstanced, paid the illegal processing taxes directly to the Collector of Internal Revenue. Then early in 1934 they were required to adjust the taxes so paid and thereafter pay to C. A. Burnette Company (a public abattoir) who in turn remitted to the said Collector. The change was due to instructions from the Commissioner, first found in Internal Revenue Bulletin No. 20, page 19, dated May 14, 1934. Also C. B. XIII-1, page 451, January-June, 1934, which reads as follows:

> Hogs are delivered by the owners to the M Company, which is engaged in the business of slaughtering hogs. The company kills the hogs, removes the hair, chills the carcasses, and returns them to the respective owners. The carcasses are not eviscerated. The owners pay the company a stipulated price per hog for its work.
>
> The questions have arisen (1) whether the company is the first domestic processor of the hogs within the meaning of section 9 (d) (4) of the Agricultural Adjustment Act; (2) whether for the purpose of the processing tax the company acts as the agent of the owners of the hogs which it slaughters; and (3) if the

company acts as such agent, whether the agent or the principal is liable for the processing tax.

Section 9 (a) of the Agricultural Adjustment Act imposes a processing tax upon the first domestic processing, and provides that the tax shall be paid by the processor. Section 9 (d) (4) of the Act defines the processing of hogs as "the slaughter of hogs for market." The words "for market" *are evidently used* to distinguish the slaughtering of hogs where the resultant product is sold from slaughtering by the owner of the hogs for his own use.

One who is engaged in the business of slaughtering hogs for others, as in the instant case, is deemed to be an independent contractor and not the agent of the owners whose hogs are slaughtered. Such a contractor is the first domestic processor of the hogs within the meaning of the Act. Accordingly, the M Company is liable for the processing tax. (Italics ours.)

It is ridiculous to say that a dead, uneviscerated hog, with head and hoof on (no change in form) was processed to a "marketable form." The fact that a factory agent was an independent contractor was never considered to be controlling with respect to a manufacturers' excise tax has been shown previously herein.

In preparing the above ruling, there was a failure to recognize the accepted rules of construction in construing statutes. Respondent separated the words "the slaughter of hogs" from the words "for market." This is contrary to the meaning intended by Section 9 (d) (4) of the Agricultural Adjustment Act; the Regulations of the Department of Agriculture; and, contrary to Treasury Decision No. 4403 (approved November 2, 1933, effective as of July 9, 1933). A "custom ginner" is usually an independent contractor, but it is clearly conceded that he is not the "processor" within the intendment of the said Act upon whom the processing tax on cotton was to be imposed. *He was the first domestic processor in fact,* but not in preparing the cotton "for market" as intended by Congress.

What justification was there to speculate, *with admitted uncertainty,* as to the intention of Congress with respect to the words "slaughter of hogs for market"? This ruling befogged that which was clear prior thereto. Section 15 (b) of the Agricultural Adjustment Act specifically exempted the producer from tax on the processing of hogs for consumption by his family or employees. The words "for market" were not needed to make that understood and therefore Congress did not intend that the words "slaughter of hogs for market" be construed in that limited sense.

Now with respect to the processing tax in controversy which was to be imposed upon the processor who "slaughtered the hogs for market." After C. A. Burnette Company had slaughtered the hog, it was in substantially the same "form" as before it was killed. The blood, hair, and viscera had been removed. The head was on and the leaf lard remained. (R. 46.) The carcass was not in marketable form within the ordinary concept of that meaning nor as is recognized generally within the customs of the industry. Like lint cotton, the carcass could be sold, and there may be some occasions when the owner of the carcass would sell it in that form. Such exceptions, however, would largely be confined to the producer-owner or where the carcass would be sold by one packing company owner to another packing company. *In such a case usually the head is removed and the leaf lard taken out before sale.* But the carcass is at an entirely different stage of processing from flour as processed from wheat, which is sacked and ready for sale. The carcass is readily comparable from a "market" point of view with lint cotton (after ginning)—either could be sold, but such sales are the exception rather than the rule. Congress did not overlook those facts in defining the term "processing," or in its direction to the Secretary of Agriculture to give due regard to the customs of the industry.

Before the carcass can be removed or cut it must be

chilled. As soon as it is chilled it is taken to the plant of your petitioner and there the head is removed; the leaf lard taken out and placed in the rendering tank; and, it is cut into the primal parts, which are further processed or manufactured in the preparation "for market" in the ordinary concept of those words. The rendering of lard made it ready "for market."

Petitioner further contends that the custom slaughterer, as such, could not have, for other reasons, slaughtered the hogs "for market." The custom slaughterer did not own the hogs and had no authority to sell the same to anyone in any form. The slaughterer was a *bailee for hire* to do a specific job under a contract, and this specific work was performed under the supervision of the petitioner. C. A. Burnette Company was slaughtering the hogs "for a fee" and not "for market." That company could have, and probably did at some time or other, but not often, slaughter a hog or hogs for an owner-producer for consumption. In such case the carcass, when delivered, had not been slaughtered for market, and no tax was imposed thereon. The intent was that of the owner, not the slaughterer. Later, the owner-producer may change his mind and sell rather than consume all or a part of the carcass, in which case, under certain conditions, either he or the purchaser was compelled to pay the tax. (See Hog Regulations 1, Supplement 1, *supra.*)

To slaughter hogs for market *there must be an intention to slaughter for market.* C. A. Burnette Company had no such intent and could not have known exactly what was to be done with the carcasses after they were removed from its plant.

Under the facts on which Respondent's ruling was based, the government inspection could not take place until the owner-processor had received the hog from the public abattoir, as the hogs were delivered uneviscerated. The entire

hog might be condemned as unfit for consumption, and no part be sold. Condemned parts of hogs were exempted from tax under the Agricultural Adjustment Act. This fact conclusively demonstrates that the Respondent's ruling was a departure from the taxing plan of Congress.

The New English Dictionary defines the verb "market" as "(a) the action or business of buying and selling; a commercial transaction, a purchase or sale, * * *; (b) the marketing or selling of (a commodity)." (Vol. VI, p. 172 "M", 1908.)

The definition of the word "market" could be extended to great length, but for no purpose. Brief definitions are quoted by the Board in both the majority and dissenting opinions. (R. 55, 56.) *The common-sense application of a reasonable definition to the facts in this case is the problem here.*

With respect to the larger meat packing companies who own and operate their own abattoir, the slaughter of hogs is the first of a series of processes in preparing the hogs for market. It is the beginning of processing methods by the "processor" who continues the "processing" until the resultant pork products are ready for sale, or for market.

The application of the words "slaughter of hogs for market" with respect to petitioner clearly shows that it was the real party of interest; *it caused its own hogs to be slaughtered "for market"* (under its own supervision) (R. 43) *with the intent that the pork products be prepared for market by its own processing methods; and it was the "processor" who once having begun the processing operations continued the processing thereof until the resultant pork products were in their "first marketable form."* This conforms exactly to the plan and purpose with respect to the meaning of "manufacturer" under prior statutes imposing an excise tax upon the manufacture of certain articles.

It is interesting to note that in the case of *Bird* v. *Grant* (also *Tritt* v. *Grant*) (94 New York Supplement 127) the court held that the erection and maintenance of a slaughter house is not a "market purpose" within the meaning of a conveyance to a city of land for market purposes, and for ships, canals, and piers and other public works, in connection with such market purposes.

The tax on a 220 lb. hog was $4.95 (at $2.25 per cwt.) and $7.88 on a 350 lb. hog. The killing fee was 75¢ per head. Therefore, the tax was from five to ten times greater than the killing fee. Here is a case where the tail wags the dog if the custom slaughterer is deemed the taxpayer. Such an unusual position could be justified only by clear and unambiguous wording of the Agricultural Adjustment Act. *The authority therefor is conspicuously absent.*

That taxing statutes are to be strictly construed is a settled question. This is a rule of uniform application. The courts have diligently adhered to the theory that taxing statutes should not be extended by implication or interpretation beyond their true import.

It is equally well settled that in case of doubt, taxing statutes are to be interpreted strongly against the government and in favor of the taxpayer.

In the case *Bankers Trust Co., et al.* v. *Bowers,* 295 Fed. 89, the court (in construing Section 226 C of the Revenue Act of 1921, pertaining to returns for less than one year) said:

> The interpretation of statutes levying taxes must not be extended beyond their provisions by implication, nor must they be interpreted beyond the clear import of the language used. In case of doubt they are interpreted strongly against the government and in favor of the taxpayer.

The words "slaughter of hogs for market" do not apply to a public abattoir *as the commodity has not been prepared*

by the slaughterer for market or for its distribution or use, when the intended meaning of those words is drawn from the Act in its entirety. Therefore, it is improper to extend the meaning of those words, by interpretation, beyond the clear import of the language used.

In the decision of the Circuit Court of Appeals, under the caption "The Taxing Statute," reference is made to the Congressional Record, Volume 77, pages 671-766, 786, 1350, and 1562-1565. The discussion by members of the Senate does not support the decision of that Court in the instant case. The remarks of members of the Senate were here directed to the problem of the owner-producer (the farmer) and show everywhere that the Senate was there concerned with occasional sales.

With respect to the farmer, the general pattern of the Act as presented by the petitioner was followed. Upon the occasional sales of pork products, the tax attached at all times to the *owner* of the pork products who was considered the processor upon whom the tax was imposed. Exemption was specifically made to the farmer for occasional sales, and in such cases the *transferee-owner,* such as a hotel, restaurant, etc., became the first domestic processor within the meaning of the Act.

The statement of Senator Barkley, found in Volume 77, page 1562, with reference to a casual sale by farmer-producers is considered to be important, particularly because he was one of the administration leaders and appeared to be more familiar with this bill than most of the other members of the Senate. His statement is as follows:

> I doubt whether it would be within the meaning of this language. Of course we cannot be technical about the use of the term "first process", or "first actual operation", which might mean the shooting of the hog or knocking him in the head with an ax or dipping him into scalding water in order to scrape the hair off. *I do not think all of these different steps in preparing the hog for market constitute processing within*

> *the meaning of the bill or would require a tax.* I think the way the farmer might treat a hog, whether it was made into sausage or cut into hams and shoulders and various sections of the hog *in a manner which might be desired by the consumer, would be such processing as would require a tax.* (Italics supplied.)

From the foregoing it seems obvious that the Senate intended to avoid all absurd consequences in the administration of this bill and expected no departures from the general plan except where specifically incorporated in the Act.

There is no provision in the Agricultural Adjustment Act, or in discussions on the floor of the Senate, supporting the decision of the Circuit Court of Appeals. *The plan of Congress had the logic of placing the tax burden in the first instance upon the processor-owner whose processing operations brought the product to a point where it moved into the channels of trade.* This is the only logical place to apply a tax which attached to a commodity. *Congress avoided, with the one necessary exception, the application of a tax against a processor-agent.*

It is believed that the ruling of the Commissioner of Internal Revenue holding a public abattoir a taxpayer within the meaning of the Act violates the general plan and structure of the Act, particularly when it is considered that no provision has been made to permit credits (drawbacks) for condemned parts to anyone other than the processor who paid the tax.

In the ruling of the Commissioner, the public abattoir killed the hogs, removed the hair and forwarded the carcasses to the owner *not eviscerated. The first post mortem could not take place until after evisceration* at the plant of the owner-processor, at which time it would be determined whether the hog or any parts thereof were to be condemned by the Department of Agriculture as unmarketable. In such case the apparent procedure was that

the hog owner notified the public abattoir of the amount of the condemned parts; then the public abattoir filed a drawback claim therefor, which was allowable. Neither the Agricultural Adjustment Act nor the Regulations of the Department of Agriculture authorize this procedure.

The attention of the Court is specifically directed to the fact that the *petitioner agrees that the processing tax was to be imposed at the time of the slaughter of the hogs in question, but contends that the tax was to be imposed upon it as processor-owner, and not the public abattoir, who was merely a bailee for hire.* The slaughtering determined the point at which the tax attached. In this way there could be no question arise as to the possibility of the Government losing revenue, as the tax was paid on the full pre-slaughter live weight of the hog. Neither the wording of the Agricultural Adjustment Act nor the Regulations of the Department of Agriculture are contrary to this interpretation. *It is believed that where two interpretations are possible, the one that would avoid unreasonable consequences and hardship should be followed.*

It is respectfully urged that the Circuit Court of Appeals erred in that part of its decision captioned, "The Taxing Statute" (R. 91), in finding "that a tax attaching to a product as it emerges from the subsequent processing operations would fail to reach a part of the commodity on account of the loss of weight during the operations." It is for this reason that the Secretary of Agriculture and the Treasury Department provided what is known as "conversion factors." (Hog Regulations, T. D. 4406.) The conversion factors with respect to hogs provided the amount of the tax applying to primal cuts. When all of the primal cuts of a hog have been taxed as provided by the conversion factors, the amount thereof equalled $2.25 per cwt. of live weight. Conversion factors were published for each of the eleven basic commodities subject to the tax

under the Agricultural Adjustment Act, in recognition of the fact that the term "processing" as defined by the Agricultural Adjustment Act frequently began at various stages of secondary processing. It is therefore submitted that the reasoning of the court in holding that the statute imposed the tax upon the first processing of hogs was a failure to recognize certain of the basic facts that petitioner has carefully attempted to disclose.

If the practical relationship of the parties with respect to the subject matter is to be subordinated to a strained interpretation of particular words, *it would not be absurd to say that the employee who actually kills the hog performed the first domestic processing and was therefore the processor subject to the tax.* If Congress intended absurd consequences with respect to the refunding of the illegally exacted tax, it could have retained all of the funds collected and be unjustly enriched to the full extent thereof by holding that the servant was the processor. *Since the employer must necessarily pay the processing tax for the servant, all packing companies would then find themselves in the same position as your petitioner.* The servant as a taxpayer could not recover because he bore no part of the burden thereof, while the employer could not recover since he was not the taxpayer. The court refused to accept this type of reasoning in the case of *Lucas* v. *Kentucky Distillers & Warehouse Co.*, 70 Fed. (2d) 883.

That the petitioner supplied every cent of the money used to pay the processing taxes in controversy, there can be no doubt. The procedure it was compelled to follow in delivering the money to the United States Government should not be a controlling factor. The money was illegally collected and should now be returned to this taxpayer, at least to the extent of the burden thereof (the loss) that it has been compelled to bear.

Under Title VII the extent of the burden borne cannot

be determined except by the use of the methods and formulae provided by Section 907 thereof, and must, as a result thereof, come within that class of cases over which the Board has been given exclusive jurisdiction. (This point will be fully explained under Argument II.) When the taxes were collected they were designated "processing taxes" and paid as such, and there is no reason for calling the tax by another name in this proceeding. Therefore, the Circuit Court of Appeals erred in sustaining the decision of the Board.

II.

PETITIONER IS A PROPER CLAIMANT UNDER THE PROVISIONS OF TITLE VII OF THE REVENUE ACT OF 1936 AND THE UNITED STATES PROCESSING TAX BOARD OF REVIEW HAD JURISDICTION TO ENTERTAIN THIS PROCEEDING.

It is respectfully submitted that the Petitioner has clearly shown that it was the "taxpayer" within the intendment of the Agricultural Adjustment Act. The Respondent denied the claim for refund for the recovery of the processing taxes because (R. 9):

> Refund of tax paid under the provisions of the Agricultural Adjustment Act is allowable under Title VII of the Revenue Act of 1936 only to the person who paid such tax to the United States * * *. Since the amounts for which you claim refund were not paid by you to the United States, the Commissioner is without authority to consider your claim.

The above ruling is clearly incorrect. On July 1, 1935, the Collector of Internal Revenue demanded payment and received $2,589.12 from petitioner, which was then designated as "processing taxes." No part thereof has ever been refunded (R. 43, 44). Petitioner also paid $13,711.23 of processing taxes to the Collector for November and December 1933, which payments were later conditionally (but not actually) returned to it early in 1934. The

money thus returned was then paid to the Collector who applied the same as a credit to the account of C. A. Burnette Company (R. 19, 43.) Therefore, in fact the petitioner paid a total tax of $16,300.36 directly to the United States. With respect to this amount there should have been no controversy.

The case of *White* v. *Hopkins*, 51 Fed. (2d) 159, was a suit brought against the Collector to recover taxes illegally assessed against the appellant, who had been compelled to pay the taxes. The appellee contended that since the appellant was not the "taxpayer" under the particular Revenue Acts involved that no right of recovery existed. In refusing this contention the court, at page 162, said:

> As appellee's contention is based mainly on the definition of "taxpayer," we may consider that section in the light of well-settled rules of construction. "A statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required." * * * "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character."
>
> * * * by necessary implication persons subject to taxes imposed by previous acts are included in the term "taxpayers."

and on page 163:

> * * * The reasonable construction of the section is that the definition of "taxpayer" does not exclude other definitions in general use and commonly understood. The dictionaries all define "taxpayer" as "one who pays a tax."
>
> The collector demanded payment of the tax and enforced collection by threats. Whether these threats could be made effective is immaterial. They were sufficient to operate on the mind of appellant and induce him to make payment against his will. The Commissioner received the money and retained it. He entertained and passed upon the application for a refund

and notified appellant personally of the rejection of his claim, without suggesting that he did so because he was not considered the taxpayer.

The $16,300.36 of processing taxes collected directly from the petitioner as a "taxpayer" were not collected as a "tax with respect to the processing of a commodity *for a customer* for a charge or fee" (Section 913 (b) of Title VII). *Who was petitioner's customer with respect thereto?*

It is respectfully urged that as to the $16,300.36 the majority opinion of the Board (sustained by the Circuit Court of Appeals) was in error and the minority opinion clearly correct (R. 54, 55, 56, 57).

Reference is now made to the larger remainder and the related facts. The Collector was fully aware of the fact that petitioner and others similarly circumstanced were paying all of the processing taxes imposed upon their hogs, through C. A. Burnette Company, for the period from January 1934 to May 1935. Petitioner attempted to pay all of the taxes in controversy directly to the Collector, but was denied this right (R. 43, 44, 45).

The petitioner was a party to the action against the Collector in the United States District Court for the Northern District of Illinois, which court restrained further collection of the tax pending the determination of the constitutionality of the Agricultural Adjustment Act (R. 45). The Collector knew that the petitioner, at his demand, was supplying C. A. Burnette Company with the money with which to pay all the said tax with respect to and attaching to hogs which petitioner owned and caused to be slaughtered (R. 44).

The question as to just who was to remit to the Collector was not merely a matter of form. Petitioner believed it was liable for the tax and also believed that C. A. Burnette Company was not financially sound at that time. Caution was used to avoid any possibility of the tax being imposed

a second time, with disastrous consequences (R. 44). A committee was chosen by the Packers Association; an officer of petitioner was a member thereof. C. A. Burnette Company permitted the committee to make regular inspection of its books to see that the monies advanced for processing taxes were regularly remitted to the Collector (R. 45). Clearly C. A. Burnette Company was considered by all the parties as the "collection agent" for the larger remainder of the processing taxes (R. 44).

It is now urged that with respect to the $243,774.79 ($260,075.15 minus $16,300.36) of processing taxes it paid through C. A. Burnette Company, petitioner is a proper claimant under Title VII of the Revenue Act of 1936. The contention is also made that the Board had jurisdiction with respect thereto. In support of those contentions, an analysis of the pertinent provisions of the Act is hereafter presented. However, a summary of the particular points believed to be disclosed by that analysis may be enumerated as follows:

1. The wording of the Act provides a full and adequate remedy with respect to all proper matters, with particular reference to this case.

2. The various claimants, under the Act, were divided into two distinct classifications, namely:

   (a) Those claimants with respect to Original Floor Stock Tax, Compensating Tax, and the tax on Custom Processing.

   (b) Where either the tax was "collected from" or "paid by" the claimant, who as the processor-owner (as distinguished here from custom processing), must include in his claim the information required by Section 907, relative to the "burden" of the tax "borne" or "shifted."

3. That the Circuit Court of Appeals, in construing the Act, recognized only a part of the distinction with respect to the above classification of claimants.

4. That petitioner is a proper claimant under Title VII, and the Board had jurisdiction to entertain this proceeding in its entirety; because,

(a) The petitioner was the "taxpayer" within the intendment of the Agricultural Adjustment Act; and,

(b) *Whether or not a "taxpayer,"* a full, adequate, and equitable relief was provided for petitioner under Title VII, for the recovery of at least that part of the "burden" of the illegal tax "borne" by it.

Section 902 of the Act presents conditions on the allowance of refunds. This section is stated in full at R. 30, but the first few lines thereof read as follows:

> No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount *paid by or collected from any claimant* as tax under the Agricultural Adjustment Act, unless * * *.

Sections 902, 906, and 907 of the Act never speak of the "payer" of the tax, but speak only of the "claimant," and emphasize everywhere that the important thing is not who delivered the money to the Collector, but who has "borne the burden of the tax," *in the first instance,* and whether it was "shifted" or "passed on."

That Congress intended to provide a complete remedy to those who were in fact the taxpayers, or the person who immediately bore the responsibility, with respect to the processing taxes imposed, is supported by the equitable provisions of an amendment to the Second Deficiency Appropriation Act of 1938 (H. R. 10851). That amendment settled the question with respect to the refunding of the tax collected under the Bankhead Cotton Act of 1934, and allowed the owner of the cotton to recover a tax clearly imposed upon the "custom ginner." The Second Deficiency Appropriation Act of 1938 provided as follows:

> Refunds shall be allowed to the owner or owners of the cotton at the time of ginning, to the extent that the amount of the tax was shifted to such owner or owners by the cotton ginner and was not shifted by such owner

> or owners to other persons, and in such cases, but only for the purpose of this paragraph, *the tax shall be considered to have been paid by the ginner to the United States for the account of such owner* or owners.

The words "paid by or collected from" as found in Section 902 of Title VII of the Revenue Act of 1936 were used for a particular purpose. The inclusion of both "paid by" and "collected from" cannot be attributed to accident or carelessness. The words do not necessarily mean the same thing, as will be seen if applied to this case. When considered in the light of the intent as expressed by the Second Deficiency Appropriation Act they lead to only one conclusion, namely, that Congress intended a full and adequate remedy to all proper claimants for the recovery of the illegally exacted processing taxes.

Petitioner insists that Congress did not intend to provide a remedy for all large processors and a remedy for only a few of the humble whose voices can scarcely be heard. Nor is it difficult to construe Title VII of the 1936 Revenue Act to afford a complete remedy with respect to all questions, when all of the provisions of the Act are considered.

Section 903 relates to the filing of claims. (R. 31.) Attention is particularly directed to the following which is found therein:

> No refund shall be made or allowed of *any amount paid by or collected from any person as tax* under the Agricultural Adjustment Act * * *.

and also:

> * * * such regulations may require that claims for refund of *processing taxes* * * *.

It will be observed that the term "processing taxes" is used first in Section 903, and cannot be found in Sections 901, 902, and 905.

Section 905 provides that the Court of Claims and the

district courts of the United States shall have concurrent jurisdiction regardless of the amount in controversy, except in those cases where the United States Processing Tax Board of Review has jurisdiction as provided by Section 906. This is further proof that Congress intended a complete remedy with respect to all questions.

Section 906 is the authority for the establishment of the Board and outlines its jurisdiction. With reference to petitioner's contention that will follow, certain provisions of this Section are presented as being material:

> (a) Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of the enactment of this Act, shall be brought or maintained in any court for the refund of any amount paid or collected as processing tax, as defined herein, under the Agricultural Adjustment Act, except as provided in this section * * *.
>
> The Board shall have jurisdiction in proceedings under this section to review the allowance or disallowance of the Commissioner of a claim for refund, and to determine the amount of refund due any claimant with respect to such claim.

It will be noted that reference is made in Section 906 (above), "to any amount paid or collected as processing tax as defined herein." The following definitions are found under Section 913 of the Act:

> When used in this title—
>
> (a) The term "tax" means a tax or exaction denominated a "tax" under the Agricultural Adjustment Act, and shall include any penalty, addition to tax, additional tax, or interest applicable to such tax.
>
> (b) The term "processing tax" means any tax or exaction denominated a "processing tax" under the Agricultural Adjustment Act, but shall not include any amount paid or collected as tax with respect to the processing of a commodity for a customer for a charge or fee.

The definition of the words "processing taxes" found in Section 913 (b) of the Act obviously has no application in Section 902, since those words are not used therein.

The sole purpose of Section 913 (b) was to give the federal courts and not the Board jurisdiction with respect to claims filed by a so-called custom processor, but had no application to your petitioner as a processor-owner. By this reasonable construction both persons who were in the first instance affected by the imposition of the tax are recognized, and a just remedy provided.

The Court of Claims and the district courts were given concurrent jurisdiction of cases in the first classification with respect to original floor stocks taxes and compensating taxes. The forms provided by the Respondent on which to file such claims are identified as P. T. Form 76 and P. T. Form 77.

An inspection of P. T. Forms 76, 77, and 78 (custom processing tax), clearly indicates that the Respondent has considered all such claims to be within the first classification. The information required and the similarity of forms can lead to no other conclusion. Petitioner agrees with that conclusion.

It is apparently admitted by the Respondent that a "claimant" may file a claim for "custom processing taxes" (P. T. Form 78) under Section 902 of Title VII. Section 913 (b) of Title VII clearly applies thereto within the meaning of Section 906, leading to the conclusion that the Board shall have no jurisdiction in such cases.

The evidence required to establish the "burden borne" or "burden shifted" with respect to a claim for refund for "taxes" collected from a custom processor is virtually of the same character as in the case of original floor stocks taxes and compensating taxes. Since the tax collected from a "custom processor" was relatively high as compared to the charge for the service performed, the determination of the extent of the "burden borne," if any, should be easier than with respect to the other two types of claims under the first classification.

An entirely different situation is found in the second class of claimants. Section 907 of Title VII prescribes a complicated formula, by which to measure the burden of processing taxes "borne" or "shifted by" a processor-owner in the first sale of the commodity as it moved out into the channels of trade. The information with respect to the formula was mandatory and the result thereof was by law presumed to be prima facie correct. Section 907(e) provided that either the claimant or the Commissioner could rebut this presumption.

By the formula, the average gross margin per unit for two years prior to the imposition of the tax, together with the average gross margin per unit for the six full calendar months after the Agricultural Adjustment Act was invalidated (February 1, 1936 to July 31, 1936) was compared with the average gross margin per unit during the tax paid period. If the average gross margin was higher during the tax paid period, it was presumed that all the tax burden had been "shifted," but to the extent the average margin was lower in the tax paid period, the tax was presumed to have been "borne" by claimant. The theory is not difficult to understand, but many difficulties may be experienced in the application thereof to a particular case.

It is quite obvious that sales values and gross margins may be affected by many other economic factors than the tax. But under the formula, the tax alone is considered to be the sole influence. Therefore, complicated evidence of much magnitude might be presented by either party at the time of trial, in rebuttal of the presumption. The $18,-126.43, referred to by the Circuit Court of Appeals (R. 88), as the tax burden borne by petitioner, is only the formula result. During a trial on the merits before the Board, evidence may be presented to rebut the accuracy of this formula. Therefore, the amount of the tax burden borne by the petitioner has not been determined.

It is reasonable to assume that Congress recognized that the "burden of the tax" was of necessity passed on by, let us say, a "custom miller" to the owner of the commodity, particularly if the tax was five or ten times greater than the charge for the service. A great financial loss, if not ruin, would have otherwise resulted to the custom miller. As all, or nearly all, of the tax was necessarily *paid by the owner* of the commodity to the "custom processor" prior to the payment by the processor to the Collector, the owner was actually the person who "paid" the tax in the first instance. The funds thus applied enabled the "custom miller" to remit to the Collector.

Congress clearly recognized that a complete remedy would not be provided to those persons directly related to the payment of the tax, unless both the "custom miller" and the owner, who actually "paid" the tax, were permitted to recover, at least to the extent of the burden thereof borne by either of them and not shifted to others *in the first actual sale of an article or commodity in its "first marketable form."* It is equally apparent that had Congress desired to restrict refunds to those from whom the tax was "collected" by the United States, or "paid by" a person directly to the United States, or to persons who were the "taxpayer," no difficulty would have been experienced in making this purpose unmistakably clear by the use of appropriate language in the remedial statute. The decisions of the Board and the Circuit Court of Appeals have unduly restricted the intent of Congress as expressed in Title VII. This narrow interpretation seems very unsound, when equal justice can so readily be extended without doing violence to the language of the statute.

For reasons above stated, the petitioner contends:

1. That, if this Court should find that it was the "taxpayer" within the intendment of the Agricultural Adjustment Act, then as a "processor-owner" the claim comes

within this second classification; that, it must present the information required by Section 907 of Title VII; and, that the Board had jurisdiction to entertain this proceeding in its entirety.

2. That, in the alternative, if this Court finds that Congress intended to recognize a "public abattoir" as "a processor within the meaning of the Agricultural Adjustment Act," then petitioner is a proper party claimant under the said Title VII for the recovery of the processing taxes "paid by" it through the "collection agent."

3. That, as a proper claimant under (2) above, the definition found in Section 913 (b) has no application to petitioner; its claim must present the information required by Section 907 of Title VII; and, the Board had jurisdiction thereof in its entirety.

III.

THE DECISION OF THE CIRCUIT COURT OF APPEALS WILL RESULT IN CONFUSION AND CONCOMITANT HARDSHIP UPON PETITIONER IN CONNECTION WITH THE TAX ON UNJUST ENRICHMENT PROVIDED BY TITLE III OF THE REVENUE ACT OF 1936. THAT ACT RECOGNIZES ONLY A PROCESSOR AND A VENDEE. WHAT IS THE POSITION OF PETITIONER THEREUNDER?

In presenting this argument, it is not proposed that this Court consider or decide questions not involved in this proceeding. It is believed, however, that this Court may consider the full effect of its decision not only with respect to the questions raised here, but also that which may follow by necessary implication.

The Treasury Department of the United States Government has been withholding the completion of its examination of the returns of unjust enrichment filed by the petitioner and others similarly circumstanced pending the decision of the Circuit Court of Appeals in this case. This seemed advisable and necessary to the Treasury Depart-

ment in view of the fact that it could not determine whether the tax under Title III of the Revenue Act of 1936 should be imposed upon your petitioner and others as processors or as vendees. As a result of the decision of the Circuit Court of Appeals, it is now proposed by the Treasury Department to consider your petitioner as a vendee in determining the amount of its unjust enrichment tax liability, if any.

A brief explanation of the more important provisions of Title III of the Revenue Act of 1936 is necessary in order that the problem involved may be presented.

The processing tax imposed upon the slaughter of petitioner's hogs was paid from November 5, 1933 until May 1, 1935, and on the latter date an injunction was granted restraining the collection of additional tax from petitioner and others, and provided that the tax payments be placed in escrow pending final determination as to the constitutionality of the Agricultural Adjustment Act. Therefore, from May 1, 1935 until January 6, 1936, the money placed in escrow was not paid to the Federal Government. After the decision of this Court in the case of *U. S.* v. *Butler*, 297 U. S. 1, the escrowee returned the funds to the petitioner who had deposited the same. The claims for refund under Title VII of the Revenue Act of 1936 cover the period during which the *tax was imposed and paid*, whereas the unjust enrichment tax under Title III of the said Act pertains to the period during which the *tax was imposed but not paid.*

The theory of the tax on unjust enrichment is that processors were possibly able to pass on all or a part of the burden of the said tax during the period the tax was imposed but not paid, and therefore a tax of 80% was proposed to the extent of the unjust enrichment as determined under Title III.

A tax of 80% was likewise imposed upon vendees who

received reimbursements of processing tax from their vendors.

Title III of the Revenue Act of 1936 does not operate in the same manner upon both processors and vendees principally because a processor's income from unjust enrichment is, among other things, limited to the amount of the net profit realized either during *the entire taxable year* or *that part of the year during which the tax was imposed but not paid.* If a processor has a net operating loss in connection with the products subject to tax during the period when the tax was imposed but not paid, there is no unjust enrichment tax.

However, in the case of a vendee who has received reimbursements from a processor, there is no limitation with respect to the amount of the net income resulting from the sale of the taxable products. A vendee might sustain a large net loss in selling the taxable commodity during his taxable year and yet be subject to a tax of 80% upon all reimbursements received by him from his vendors.

It is true that an arbitrary determination of tax burden borne and shifted is available to both the vendor and the vendee under formulae prescribed under Title III.

These formulae provide in substance for a comparison of gross margin for a period beginning six years prior to the imposition of the tax with the period during which the tax was imposed and not paid or that period for which the reimbursements applied. In many cases, however, it will be found that the records of the taxpayer are not available for that period, or the taxpayer may not have been in business during the full six-year base period, or for many other reasons, the information prescribed by the formulae is not available.

From a careful study of this problem it has been found that the advantage in connection with the limitation of net

profit is of vital importance and gives the processor an obvious advantage over the reimbursee.

In the instant case the petitioner placed funds in escrow pending the determination of the constitutionality of the Agricultural Adjustment Act, and these same funds were returned to it after January 6, 1936. It seems clear that the petitioner was not the vendee of the public abattoir, nor was it reimbursed by any vendor with respect to the funds it placed in escrow. In this case it received back its own funds. Under the decision of the Circuit Court of Appeals, the petitioner was not the taxpayer upon whom the processing tax was imposed. The question now arises if it was not such a taxpayer, what was its legal position with respect to the escrow funds?

C. A. Burnette Company, who was not the owner of the hogs upon which the tax here in controversy was paid, *was not a vendor of the petitioner. To be a vendor requires the sale of an article of personal property in the course of which title passes. C. A. Burnette Company was merely a bailee for hire to perform a small but necessary service incident to the processing of the hogs of the petitioner by the petitioner into their first marketable form.*

The Circuit Court of Appeals apparently believed that the relationship here is that of *vendor and vendee* where, in fact, no such relationship existed. The only vendor and vendee situation that could arise would be where petitioner as vendor sold the resultant pork products that it had processed to marketable form to its vendees. There is no vendor-vendee relationship involved in this proceeding.

The decisions of the Circuit Courts of Appeal in the cases *of F. & F. Laboratories* v. *Commissioner,* 104 F. (2d) 563, and *Oswald Jeager Baking Co.* v. *Commissioner,* 108 F. (2d) 375, and *Zinsmaster Baking Co.* v. *Commissioner,* 109 Fed. (2) 738 (Eighth Circuit), are not adverse nor inconsistent

with the contentions advanced by the petitioner.

Nevertheless, the Treasury Department, as a result of the decision of the Circuit Court of Appeals, has indicated that the petitioner will now be taxed as though it were a vendee and be denied the right to limit the amount of its unjust enrichment, if any, by the amount of its net profit or loss during the time the tax was imposed but not paid.

Had Respondent not made his incorrect informal ruling in May 1934, the petitioner would have continued to pay the processing tax in controversy directly to the United States Government, and it is very probable the decision of the Board, or the decision of the Circuit Court of Appeals would have sustained the view of your petitioner.

From the date of Respondent's ruling, confusion started. Collectors of Internal Revenue in different districts were inconsistent with respect to collecting the tax from the public abattoir or the processor-owner of the hogs. In the Trunz case, *supra,* the Collector demanded payment and collected from the processor-owner until May 1935, whereas such collections were demanded from petitioner only until May 1934.

Now, as a result of that ruling, the Board and the Circuit Court of Appeals, by not recognizing this alleged error, have, by their respective decisions, acknowledged that petitioner's larger competitors have rights under a remedial statute that are denied to petitioner.

Nor is that the end of the difficulty. Petitioner must yet contend with the very serious problem of a possible tax under Title III that is more drastic than that imposed upon its financially stronger competitors.

If Title VII cannot be construed to provide a remedy for the petitioner, it is urged that this remedial statute is unconstitutional, in failing to provide due process with respect

to all proper questions; therefore conflicting with the Fifth Amendment to the Constitution of the United States. However, petitioner urges that this statute can be readily construed to extend adequate relief to all parties of the same classification. Justice will be served by holding that the petitioner, the processor-owner, was the "taxpayer" within the meaning and intendment of the Agricultural Adjustment Act, or that petitioner was a "proper claimant" under Title VII; therefore, the Board had jurisdiction to review the Commissioner's determination in this case.

Respectfully submitted,

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